79-910

Supreme Court, U. S.
FILED
FEB 27 1980
K, JR., CLERK

In the Supreme Court of the United States

October Term, 1979

No. 79-910

7 9 - 9 1 0

STEPHEN HOROWITZ,

Petitioner,

v.

THE PEOPLE OF THE STATE OF CALIFORNIA,

Respondent.

BRIEF OF RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEAL OF THE STATE OF CALIFORNIA, SECOND APPELLATE DISTRICT

GEORGE DEUKMEJIAN,
Attorney General
ROBERT H. PHILIBOSIAN, Chief Assistant
Attorney General — Criminal Division
S. CLARK MOORE,
Assistant Attorney General
SHUNJI ASARI,
Deputy Attorney General
JULIET H. SWOBODA,
Deputy Attorney General

3580 Wilshire Boulevard, Room 800
Los Angeles, California 90010
Telephone: (213) 736-2231

Attorneys for Respondent

Westside Law Publishers Santa Monica, California (213) 450-1965

TOPICAL INDEX

Page

Questions Presented 1
Statement Of The Case 2
Statement Of Facts 3
Defense 7
Rebuttal 10

Argument

An Exigency Existed To Justify A Search Of The Trunk Of Petitioner's Automobile Without A Warrant 10
Conclusion 12

TABLE OF AUTHORITIES

Cases — **Page**

Carroll v. United States, 267 U.S. 132, 45 S.Ct. 280, 69 L.Ed. 543 (1952) 10
Coolidge v. New Hampshire, 403 U.S. 443, 91 S.Ct. 2022, 29 L.Ed.2d 564 (1971) 11
Fierro-Soza v. United States, 439 U.S. 1005, 99 S.Ct. 618 (1978) 11
Hypodame v. Chapin, 6 Wall 216, 18 L.Ed. 794 (1868) 5
United States v. Orozco, 590 F.2d 789 (9th Cir. 1979) 10, 11
United States v. Trejo-Zambrano, 582 F.2d 460 (9th Cir. 1978), cert. denied 11

Statutes

California Health and Safety Code § 11359(a) 2
California Penal Code § 1538.5 ..... 2, 3

Constitutions

United States Constitution, Amendment IV 3

In the Supreme Court of the United States

October Term, 1979

No. 79-910

STEPHEN HOROWITZ,

Petitioner,

v.

THE PEOPLE OF THE STATE OF CALIFORNIA,

Respondent.

BRIEF OF RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEAL OF THE STATE OF CALIFORNIA. SECOND APPELLATE DISTRICT

QUESTIONS PRESENTED

By its letter of January 28, 1980, the court requested a response without specifying any particular issues. The following question is raised by petitioner:

> Whether the California Court of Appeal, Second Appellate District, improperly upheld a warrantless search of an automobile upon grounds of exigent circumstances.

STATEMENT OF THE CASE

In an information filed in Case No. A-075975 by the District Attorney of Los Angeles County, State of California, appellant was charged with possession for sale of marijuana, a violation of California Health and Safety Code section 11359(a). (CT 10.)[1]

Appellant pleaded not guilty. (CT 11.) Appellant's motion pursuant to California Penal Code section 1538.5 was denied. (RT 59.)

Appellant withdrew his plea of not guilty. He pleaded guilty as charged after he and counsel waived his constitutional rights. (CT 4-8, 61.)

Criminal proceedings were suspended. Probation was granted for a period of three years upon terms and conditions including that appellant spend the first six months in county jail. Appellant was given credit for three days previously served. Appellant was given a stay of execution of the county jail sentence only pending appeal. (CT 63.)

The appeal was from the judgment of conviction. (CT 64.)

On July 17, 1979, in an opinion ordered not to be published, the Court of Appeal of the State of California, Second Appellate District, Division Two, affirmed the judgment. (Appen. A to Petn.)

On September 12, 1979, the California Supreme Court denied a petition for hearing. (Appen. B to Petn.)

---

[1]"CT" refers to the "Clerk's Transcript" of the trial court proceedings which was included as part of the record before the California Court of Appeal, Second Appellate District.

This opposition of respondent is filed pursuant to the Court's request contained in its letter of January 28, 1980.

STATEMENT OF FACTS [2]

Eugene Soman, a Los Angeles City Police Officer assigned to Venice Team I, was working with Officer Brian Tyndall on April 26, 1977, at approximately 8:30 p.m. as part of a special unit to suppress robberies. They were in plain clothes and in an unmarked vehicle. Officer Soman was driving the vehicle at Lincoln Boulevard and California Avenue when his attention was drawn to a yellow 1977 Ford LTD because the vehicle failed to stop for a red tri-light signal as it went through the intersection in the number two southbound lane nearly colliding with another vehicle, then completing a right turn proceeding westbound on California Avenue. (RT 3-4.)[3]

At the same time Officer Soman was on California Avenue approaching the intersection there were vehicles between the unmarked police car and the yellow Ford. (RT 4-5, 39-40.) The officer observed an older vehicle brake to avoid hitting the southbound yellow Ford. (RT 5, 39-40.)

The yellow Ford turned right to proceed westbound on California. Officer Soman then proceeded to go around

---

[2]This is the Statement of Facts from the motion to suppress evidence pursuant to California Penal Code section 1538.5 on the grounds of violation of petitioner's Fourth Amendment rights. Because the conviction in the instant case was pursuant to a guilty plea, no other statement of facts will be included herein.

---

[3]"RT" refers to the Reporter's Transcript of the trial court proceedings which was included as part of the record before the California Court of Appeal, Second Appellate District.

the older vehicle in order to follow the yellow Ford. The approximate speed of the 77 Ford LTD was 45 miles per hour as clocked by Officer Soman for 30 seconds for a quarter of a mile although this was a residential area. (RT 6-7, 39-30.)

Officer Soman stopped the vehicle in the 600 block of California Avenue. He did so in order to ascertain whether the driver was under the influence of something which would impair his driving and place the children and others in jeopardy. (RT 7, 18-19.)

To attract the driver's attention, Officer Soman had turned on the red light on the car and sounded the horn. The Ford pulled to the curb whereupon Officer Soman stopped behind the Ford. The officer approached the Ford's driver who had already exited his vehicle and was only a few feet from the front of the police vehicle. (RT 18, 40-41.)

The driver was appellant who was alone. He asked if he had done anything wrong. Officer Soman asked for appellant's driver's license whereupon appellant produced a Florida license. There was a brief discussion of the violation. (RT 9, 26, 40-41.)

Prior to asking for the license, Officer Soman asked appellant for his name and he had said "Stephen Horowitz." (RT 10-11.) The name on the Florida driver's license then provided by appellant was Stephen Gurivich. (RT 11.) When Officer Soman asked for the vehicle's registration, appellant said it was in the glove box. Officer Soman asked if he, Officer Soman, could get the registration of the vehicle and received an affirmative response.[4] He went into the glove box area through the driver's door and pulled out the registration to the vehicle. (RT 12, 41.)

Officer Soman took the registration and observed that it was registered to a rental agency. He looked at the rental agreement which bore the name of "Martin Horowitz." (RT 13.)

At the same time Officer Soman had entered the vehicle, he entered on the driver's side to obtain the registration. While examining the registration he observed some seeds and a little leafy substance on the floorboard of the driver's area. He noticed the familiar odor of marijuana. The officer could accurately recognize the odor of marijuana. The odor of marijuana was a much stronger odor than could be generated by the small amount of debris observed on the floorboard. The odor seemed possibly to be coming from the rear of the vehicle. (RT 14-15.)

Officer Soman informed his partner of the marijuana debris and odor and the status of the registration and then approached appellant who was standing on the sidewalk to the vehicle's right rear. The officer asked appellant if he could look into the trunk of the vehicle. He said, "Sure. Go ahead," and handed the keys to the officer. Officer Soman walked toward the trunk of the car and took the keys out of his hand. (RT 16, 42-44.) Officer Soman took the keys back whereupon appellant asked if Officer Soman had a

---

[4]There is no basis in the record to support petitioner's statement at page 2 of the petition that the officer retrieved the rental agreement without consent. In fact, the version of petitioner and defense witness Wilgus was that appellant retrieved it. (RT 109, 143.) This latter version must be rejected as conflicting with that of Officer Soman which the trial court accepted on appeal. (See *The Hypodame v. Chapin,* 6 Wall 216, 224-225, 18 L.Ed. 794, 796 (1868).)

warrant and that he did not want the officer to look in there. (RT 17, 44-45.)

The officer believed, based upon the odor, that the trunk contained marijuana. A marked police vehicle arrived at the scene and took appellant to the police station. On that basis, the trunk was ultimately opened at the scene. (RT 17.)

When the trunk was opened by Officer Soman, Officer Soman observed a brown shopping type bag from which the odor seemed to be emanating, with a lot of marijuana in it. It was People's Exhibit 3, closed at the top and laying in the trunk. Also seen in the trunk was a large rubber-type bladder or cell, a large rubber bag. (RT 17, 30, 45.) It appeared to be a four-man rubber life raft. (RT 18, 46.) There were also contained within the trunk six large bales of marijuana with an approximate weight of 230 pounds. (RT 18, 46-47.)

Officer Soman did not recall civilians coming up to the scene after the stop. (RT 32-33.)

Officer Tyndall also had occasion to notice, when inside the vehicle, the strong odor of marijuana. (RT 34-35.) There was also a strong odor of marijuana emanating from the trunk. (RT 35.) He saw the debris on the driver's area of the floorboard. (RT 35.) He and Officer Soman searched the rest of the inside of the car but found nothing sufficient to cause the odor which seemed to come from the trunk. (RT 35.)

When the two officers were later leaving the area, a boy of 16 years, approached. (RT 47.) Officer Tyndall recalled that he said he lived there and wanted to know what had transpired. (RT 48.) No vehicle had stopped when the transaction occurred. (RT 48.)

Elsie Ellis, the court clerk, could smell the odor of marijuana emanating from People's Exhibit 3 which was located a few feet away. She was familiar with the odor of marijuana in her capacity as a county clerk. (RT 69-71.)

The bailiff in the court also smelled marijuana rather than rubber. (RT 74.)

A John Burgess present in the courtroom smelled rubber rather than marijuana. (RT 79.)

Officer Phillip Flanders of the Los Angeles Police Department had been a narcotics investigator for the past eight years. (RT 88.) Prior to that time he had training in narcotics at the Los Angeles, Police Academy. He made several hundred arrests in the area of marijuana. He had seen it growing, harvested and used. (RT 89.)

Officer Flanders saw the marijuana in People's Exhibit 3 when it was brought to Venice Police Station a year before on April 26, 1977. It was moister at that time. As marijuana dries, it loses its strong odor. (RT 90.) Officer Flanders could smell the marijuana odor of People's Exhibit 3 at Venice Station. (RT 94.)

DEFENSE

Wendy Wilgus of 937 Ninth Street in Santa Monica testified that she had known appellant for three years as of April 26, 1977. In the early evening hours of that date she was driving down Lincoln Boulevard when she saw Stephen coming out of Pico News. She pulled over, greeted him and asked if she could pick up her makeup bag which was at his house. She followed him home. He was driving a Ford LTD and she drove a white Volkswagen squareback station wagon. They traveled down Lincoln Boulevard to California Street where they stopped for a light. (RT 106.)

The light turned green and appellant had to brake instead of making the right turn he planned. Appellant and Wilgus then made the right turn and appellant then passed the car which had cut him off. After several blocks the car which cut them off pulled appellant over. The car had a red light but she did not know it was a police car. She parked on the first available street past appellant's car and got out. (RT 107.) She wanted to keep an eye on her car because she was parked in an alleyway so she stood on the corner and watched. (RT 109.) In a few minutes, she saw appellant enter his car and reach over to the glove box area. He then left the car and spoke to the officers. (RT 109.)

Then Officer Tyndall struggled for something in appellant's hand, pushed appellant away and then handcuffed him. (RT 110.) She then drove to a friend's house and returned to see him taken away. The trunk of the car was closed. (RT 110-111.)

Appellant testified that "Gurivich" was the Russian translation of his name and he used it in his screenwriting and other jobs. (RT 137.)

On April 26, 1977, he pulled in front of the Pico News Agency and as he returned to his car, he saw Wendy pull up. He wanted her to follow him home where he would give her bag to her. They proceeded down Lincoln to California. (RT 139.) As he proceeded to turn right on California, a yellow Plymouth or an AMC Satelight "shot" through the intersection, whereupon he had to slam on his brakes. Wendy was directly behind him in her car. (RT 140.)

He then turned and followed the yellow Plymouth which was proceeding at 5 miles per hour. He then passed the Plymouth at 23 miles per hour, making a sign of disapproval at the officers. He saw the red light and

realized that the occupants of the Plymouth were police officers. (RT 141-142.) They stopped him and asked for his license. (RT 142.)

Appellant asked if something was wrong and the officers said, "Yes. You almost hit us back there at the light." Appellant told them they almost hit him. (RT 143.) They asked whose car it was and when he told them it was an Avis rental, they asked to see the agreement. Appellant obtained it from the glove box and showed it to them. They asked why it bore the name "Horowitz" and he showed them that it was only the credit and stamp, the name in handwriting was "Gurivich." (RT 143.)

They asked him to open the trunk and he asked why. They said it was a heavy narcotics area and they wanted to check his car. The conversation went back and forth and finally they said, "If you don't let us look in your trunk, we are going to take you downtown." They insisted he was detained, not under arrest. He was nervous whereupon the officer said, "Let me have your keys." He reached for the keys and, finally, Officer Soman pulled the keys from appellant's hand while Officer Tyndall handcuffed him. He was taken to a black and white unit which arrived. He noticed Officer Soman looking around appellant's car which he had not yet entered. (RT 145.)

David Evans testified that he was a senior designer for Avon Inflatables Limited of South Wales in the British Isles. He developed the rubber life rafts which have a life of ten years. If such a raft is not serviced anually, the materials rot and the odor is "really pungent." (RT 169.) Mr. Evans recognized the roll up cover found in the trunk over the marijuana to be made of PVC, poly-vinyl-chloride, the same material of which Avon products are made. The bag was, however, not an Avon product. (RT 169-171.) If something with a strong pungent odor were

sealed inside of the cover up, no odor would be detectable. (RT 172.)

Belinda Palmer testified that she lived at 618 Mildred Avenue in Venice and on April 26, 1977, at approximately 8 p.m. her friend Wendy Wilgus arrived at her home. Wendy appeared upset and said, "Stephen is in trouble." (RT 178.) They went back to California Street to see appellant in handcuffs. (RT 179.) The trunk of appellant's car was closed. (RT 180.)

REBUTTAL

Officer Tyndall smelled a very strong odor of marijuana when the trunk of the car was opened. He saw that the brown paper shopping bag was partially open. There was some loose debris in the mouth portion. (RT 185-186.) He moved closer to the bag at which time the odor of marijuana became stronger. (RT 186.) Then the officer went to the partially unsealed life raft. (RT 187.)

ARGUMENT

AN EXIGENCY EXISTED TO JUSTIFY A SEARCH OF THE TRUNK OF PETITIONER'S AUTOMOBILE WITHOUT A WARRANT

Petitioner contends that no exigency existed to support a search without warrant of petitioner's automobile. It is well established that all that is required to stop and search an automobile on the road is probable cause to believe it contains contraband. (*Carroll v. United States,* 267 U.S. 132, 151-153, 45 S.Ct. 280, 69 L.Ed. 543 (1952).) The fact that the vehicle is on the road and, therefore, could easily be moved or its contents hidden or destroyed constitutes an exigency justifying a warrantless search. (*United States v. Orozco,* 590 F.2d 789, 793 (9th Cir. 1979); *United States v. Trejo-Zambrano,* 582 F.2d 460, 462 (9th Cir. 1978), cert. denied; *Fierro-Soza v. United States,* 439 U.S. 1005, 99 S.Ct. 618 (1978).)

In the instant case, the exigent circumstances rendered the obtaining of a warrant an impossible or impractical alternative. Petitioner was stopped for driving through a red light and speeding on a busy street. He stopped the car at the curb. There were other vehicles and pedestrians on the avenue. (RT 3-7, 18-19, 39-41, 47.) It is interesting to note that a defense witness, Wendy Wilgus, testified that she was a friend of petitioner who fortuitously was following him home in a second car when he was stopped. (RT 106-109.) It is clear that exigent circumstances supported a warrantless search. Petitioner was transporting his contraband hurriedly when stopped on a busy street. The possibility of confederates locating and moving the vehicle was a very real one.

Petitioner's reliance upon *Coolidge v. New Hampshire,* 403 U.S. 443, 91 S.Ct. 2022, 29 L.Ed.2d 564 (1971) is misplaced. As the Court in *United States v. Trejo-Zambrano, supra,* stated at page 463, "Coolidge invalidated a warrantless search of an empty automobile which was parked in the driveway of the owner. The search occurred long after the police had cause, and when they had good reason to believe the automobile would not be removed." Exigent circumstances properly justified a warrantless search of petitioner's automobile in the instant case.

CONCLUSION

For the foregoing reasons, respondent urges that the petition for writ of certiorari be denied.

Respectfully submitted,

GEORGE DEUKMEJIAN,
Attorney General
ROBERT H. PHILIBOSIAN, Chief Assistant
Attorney General — Criminal Division
S. CLARK MOORE,
Assistant Attorney General
SHUNJI ASARI,
Deputy Attorney General
JULIET H. SWOBODA,
Deputy Attorney General

Attorneys for Respondent

PROOF OF SERVICE BY MAIL

State of California

ss.

County of Los Angeles

I, the undersigned, say: I am and was at all times herein mentioned, a citizen of the United States and a resident of the County of Los Angeles, over the age of eighteen (18) years and not a party to the within action or proceeding; that my business address is 3340 Ocean Park Boulevard, Suite 3005, Santa Monica, California 90405: that on February 26, 1980, I served the within *Brief of Respondent* in said action or proceeding by depositing true copies thereof, enclosed in a sealed envelope with postage thereon fully prepaid, in the United States mail at Santa Monica, California, addressed as follows:

Clerk, United States Supreme Court
One First Street, N.W.
Washington, D.C., WA 20543
(Hand delivered; forty copies)

Edwin S. Saul
15760 Ventura Boulevard
Ninth Floor
Encino, CA 91436

Clerk, California Supreme Court
3580 Wilshire Boulevard
Second Floor
Los Angeles, CA 90010

Howard Allen Levy
15760 Ventura Boulevard
Suite 1123
Encino, CA 91436

Clerk, California Court of Appeal
2d Appellate District
3580 Wilshire Boulevard
Third Floor
Los Angeles, CA 90010

Clerk of the Superior Court for
the Hon. Bernard S. Selber
111 North Hill Street
Los Angeles, California 90012

I declare under penalty of perjury that the foregoing is true and correct. Executed on February 26, 1980 at Santa Monica, California.

Carrie Petrucci
(Original signed)

Suzanne Newman
(Original signed)